ATTORNEY FOR APPELLANT:

MARK A. BATES
Appellate Public Defender
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ARTHUR THADDEUS PERRY
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JAN WACLAW KOSMULSKI,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0612-CR-698
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Judge
Cause No. 45G04-0504-FC-52

September 5, 2007
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MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Jan Kosmulski appeals the two-year sentence that was imposed following his conviction for Resisting Law Enforcement,[1] a class D felony. Specifically, Kosmulski argues that he was improperly sentenced because the trial court failed to identify mitigating circumstances that were supported by the record and that the trial court failed to give significant weight to his decision to plead guilty. As a result, Kosmulski claims that his sentence was inappropriate in light of the nature of the offense and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

On April 16, 2005, Kosmulski was standing in the middle of an intersection in Lake County, blocking traffic. When several Hammond Police officers arrived at the scene, Officer Kevin Harretos apprehended Kosmulski and attempted to pat him down. At some point, Kosmulski spun around and knocked Officer Harretos off balance. Kosmulski then entered his vehicle and struck Sergeant Luis Arcuri as he began to drive away. In response, Officer Luis Semidei activated the lights and siren in his police cruiser and began chasing Kosmulski. Although Officer Semidei eventually blocked Kosmulski's vehicle, Kosmulski refused to surrender. Instead, Kosmulski revved the engine and shifted the gears. When Kosmulski began to back away, Officer Semidei shot out the vehicle's tires. Although Kosmulski continued to flee, he eventually stopped the vehicle and ran from the scene. After a brief chase, the police apprehended Kosmulski.

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[1] Ind. Code § 35-44-3-3.

As a result of the incident, Kosmulski was charged with class C felony battery, resisting law enforcement as a class C felony, and resisting law enforcement as a class D felony. Thereafter, Kosmulski and the State negotiated a plea agreement, which provided that Kosmulski would plead guilty to the class D felony resisting charge in exchange for the State's dismissal of the remaining charges. Sentencing was left to the trial court's discretion.

The trial court accepted the plea, and on November 1, 2006, Kosmulski was sentenced to two years of incarceration. In arriving at the sentence, the trial court identified Kosmulski's lengthy criminal history, which included previous convictions for resisting law enforcement, possession of alcohol by a minor, and battery, as an aggravating factor. In mitigation, the trial court observed that Kosmulski had pleaded guilty "and accepted responsibility to a class D felony." Tr. p. 38. Kosmulski now appeals.

DISCUSSION AND DECISION

While Kosmulski contends that his sentence was "inappropriate in light of the nature of the offense and his character," appellant's br. p. 1, he bases this claim on the notion that the trial court abused its discretion in not giving significant weight to his decision to plead guilty. Kosmulski also contends that the trial court erred in refusing to identify his expression of remorse and his addictive behavior as mitigating circumstances.

Before addressing the merits of Kosmulski's arguments, we observe that on April 25, 2005, the General Assembly amended Indiana's felony sentencing statutes, which now provide that the person convicted is to be sentenced to a term within a range of years, with an "advisory sentence" somewhere between the minimum and maximum terms. See Ind. Code

§§ 35-50-2-3 to –7. The statutes were amended to incorporate advisory sentences rather than presumptive sentences and comply with the holdings in Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005). See Ind. Code § 35-38-1-7.1, § 35-50-2-1.3.

Here, Kosmulski committed his criminal offenses before this statute took effect but was sentenced after the effective date. In Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007), our Supreme Court observed that "the sentencing statute in effect at the time a crime is committed governs the sentence for that crime." Because Kosmulski committed the offenses prior to the effective date of the sentencing amendments, we apply the former version of the statute.[2]

This court has observed that sentencing decisions are within the sound discretion of the trial court. Jones v. State, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003). It is within the trial court's discretion to determine both the existence and weight of a significant mitigating circumstance. Creager v. State, 737 N.E.2d 771, 782 (Ind. Ct. App. 2000). An allegation that the trial court failed to identify a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999). In other words, a trial court is not obligated to find a circumstance to be mitigating merely because it is advanced as such by the defendant.

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[2] When Kosmulski committed the offenses, Indiana Code section 35-50-2-7(a) provided:

> "A person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1½) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances. In addition, he may be fined not more than ten thousand dollars ($10,000)."

Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). However, when a trial court fails to find a mitigator that is clearly supported by the record, a reasonable belief arises that the trial court improperly overlooked this factor. Banks v. State, 841 N.E.2d 654, 658 (Ind. Ct. App. 2006), trans. denied.

As for Kosmulski's decision to plead guilty, our Supreme Court has determined that a guilty plea demonstrates acceptance of responsibility for a crime and must be considered a mitigating factor. Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995). However, a guilty plea is not automatically a significant mitigating factor. Mull v. State, 770 N.E.2d 308, 314 (Ind. 2002). Indeed, when a defendant has already received some benefit from his guilty plea, he is entitled to little, if any, mitigating weight for it at sentencing. Banks, 841 N.E.2d at 658-59. In this case, Kosmulski received the dismissal of two class C felony charges. Thus, the trial court was not obliged to give more weight to his guilty plea than it did.[3]

With regard to Kosmulski's claim that the trial court overlooked his alleged show of remorse, this court has determined that the trial court is in the best position to judge the sincerity of a defendant's remorseful statements. Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), trans. denied. In this case, the record shows that only after the attorneys had presented their arguments at sentencing—and the prosecutor had argued that Kosmulski had

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[3] As an aside, we note that in Anglemyer v. State, 868 N.E.2d 482, 493 (Ind. 2007), our Supreme Court recently observed that a trial court "cannot be said to have abused its discretion in failing to 'properly weigh' such factors." 868 N.E.2d at 491. More specifically, Anglemyer determined that "[t]he relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." Id. Had Kosmulski been sentenced under the new sentencing scheme, his argument regarding the alleged improper weight that the trial court afforded his decision to plead guilty would "not [be] available for appellate review." See id.

shown no remorse—did Kosmulski state, "I know I've done a lot of wrong, . . . and I apologize for all this." Tr. p. 35. The remainder of Kosmulski's statement consisted of promises to care for his children and a plea to the trial court not to incarcerate him. Id. Under these circumstances, we cannot say that the trial court erred in declining to identify Kosmulski's alleged show of remorse as a mitigating factor.

Finally, Kosmulski asserts that the trial court erred in overlooking his addictive behavior as a mitigating factor. Notwithstanding this claim, this court has determined that when a defendant is aware of his substance abuse problem but has not taken proper steps to treat it, addictive behavior may be considered as an aggravating rather than a mitigating circumstance. Bryan v. State, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004).

In this case, the trial court acknowledged Kosmulski's alcohol problems and observed that Kosmulski had completed some substance abuse programs in the past. Tr. p. 39. However, the trial court also pointed out that Kosmulski continues to drink and "have . . . arrest after arrest." Tr. p. 38. In essence, it is apparent that even though Kosmulski knew—or should have known—that he encounters serious problems when drinking, he has continued to engage in that behavior. Thus, we cannot say that the trial court erred when it did not identify Kosmulski's alcohol abuse or addictive behavior as a mitigating factor.

In sum, Kosmulski does not prevail on his contentions that the trial overlooked certain mitigating circumstances or failed to assign appropriate weight to those factors.[4]

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[4] Kosmulski does not make any additional argument that the sentence was inappropriate pursuant to Indiana Appellate Rule 7(B). Even so, when considering the seriousness of this offense, Kosmulski's lengthy

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.

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criminal history, and his continued substance abuse, it is apparent that he has not been deterred from engaging in criminal conduct. Therefore, we can only conclude that the two-year sentence for this offense was not inappropriate when considering the nature of the offense and Kosmulski's character pursuant to Indiana Appellate Rule 7(B). See Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003) (holding that sentence review under Appellate Rule 7(B) is very deferential to the trial court's decision and we refrain from merely substituting our judgment for that of the trial court).